(5)

No. 95-928

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOHN W. ATHERTON, JR.,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CAPACITY AS RECEIVER FOR
CITY SAVINGS, F.S.B.,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Third Circuit

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL., IN SUPPORT OF PETITIONER

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ISSUE PRESENTED FOR REVIEW

Whether "federal common law" causes of action by the federal bank regulatory agencies against officers and directors of failed insured institutions survived the enactment of Section 212(k) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1821(k).

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BRIEF OF THE AMICI CURIAE
AMERICAN BANKERS ASSOCIATION, et al.,
IN SUPPORT OF PETITIONER

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioner in accordance with the provisions of Rule 37.3 of the Supreme Court Rules. Both parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The American Bankers Association is the largest national trade association of the commercial banking industry in the United States, having member banks located in each of the fifty states and the District of Columbia. Member banks of the Association include national and state-chartered banks, independent and holding company owned banks, and money center, regional and community banks. ABA member banks hold approximately ninety percent of the domestic assets of the American banking industry.

America's Community Bankers is a national trade association for 2000 savings and community financial institutions and related business firms. The industry has more than $1 trillion in assets, 250,000 employees and 15,000 offices. ACB members have diverse business strategies based on consumer financial services, housing finance and community development.

The Bankers Roundtable is a national association whose membership is open to the nation's largest 125 banking companies, which are represented in the Roundtable by the CEOs and highest officers of the companies. The companies hold approximately seventy percent of the country's commercial banking assets, operate in virtually every state and employ almost one million individuals. The mission of the Roundtable is to promote the business of banking, to encourage the development of sound banking and financial policies and practices, and to advocate the interests of its member companies in federal legislative, regulatory and judicial fora.

The Independent Bankers Association of America is the national trade association that exclusively represents the interests of community banks. Its membership includes nearly six thousand financial institutions in all fifty states and the District of Columbia.

Each of the Associations, on behalf of their respective members, has a distinct interest in the resolution of the issues presented by this case. Federally insured financial institutions need to attract and retain high quality directors and officers, not only for their own benefit, but also to see that governmental and public interests in the safe and sound operation of such institutions are served as well.

The Third Circuit's decision below, however, has at least the potential of subjecting officers and directors of insured institutions to a "simple negligence" standard of care. That standard is a more uncompromising one than that faced by the directors and officers or virtually any other business,[1] and directors and officers of insured financial

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[1] Directors of other businesses are typically protected by state law "business judgment rules," which impose a gross negligence standard of liability in actions against them, thereby guarding them against liability for errors of judgment made honestly and in good faith. See,, e.g. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del., 1984); *Auerbach v. Bennett*, 47 N.Y.2d 619, 630-31 (1979); *International Ins. Co. v. Johns*, 874 F.2d 1447, 1458 (11th Cir. 1989)(Florida law); *In re General Tire & Rubber Co. Securities Litigation*, 726 F.2d 1075, 1080 (6th Cir.), *cert. denied*, 469 U.S. 858 (1984)(Ohio law); *Lewis v. Anderson*, 615 F.2d 778, 781 (9th Cir. 1979)(California law). A simple negligence

institutions are virtually uninsurable for actions taken against them by federal regulatory agencies.[2] Those factors, taken together, provide a powerful disincentive to service as a director or officer of an insured institution. The risk of personal financial ruin is simply too great.

Since Congress has spoken directly on the question of what should be the standard of care applicable to officers and directors of insured institutions post-receivership, and has explicitly provided that the answer is a "gross negligence" standard, there is neither the need nor the justification for a judicially-created standard that differs from that, no reason to subject officers and directors to the standard of care that

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standard, on the other hand, will leave directors of federally insured depository institutions susceptible to damages when reasonable decisions they make turn out badly--as they sometimes do in any business as a result of events beyond anyone's control.

[2] A "regulatory exclusion" is a common insurance contract provision that excludes from coverage suits brought by a federal regulator. The validity of such exclusions, with respect to financial institutions' policies, has regularly been upheld by the courts despite arguments of the FDIC and others that a regulatory exclusion is void as against public policy. *See, e.g., Fidelity & Deposit Co. v. Conner*, 973 F.2d 1236 (5th Cir. 1992); *St. Paul Fire & Marine Ins. Co. v. FDIC*, 968 F.2d 695 (8th Cir. 1992); *FDIC v. Aetna Casualty & Surety Co.*, 903 F.2d 1073 (6th Cir. 1990). Even where a liability policy is available without a "regulatory exclusion" provision, the cost of it is prohibitive.

would dissuade them from accepting such a position. It is to protect the rights of their respective members' officers and directors to be free from an excessive standard that your amici appear in this case.

SUMMARY OF THE ARGUMENT

In 1989, Congress enacted a uniform, nationwide standard of care for directors and officers of federally insured financial institutions. By its plain language, the statute sets that standard as "gross negligence" or any disregard of duty greater than that. The retention of a yet-to-be-defined "federal common law" standard after enactment of the statute alters, rather than supplements the statutory standard. If such a standard ever existed, it has been supplanted by the enactment of the 1989 statute; that was the intent of Congress as shown by the words it chose to use in the statute and by the course of events surrounding enactment of the statute. This Court, as well, has viewed the 1989 statute as supplanting "federal common law" in a context so close to that presented by this case as to be all but indistinguishable.

ARGUMENT

Almost six decades ago, this Court declared that "[t]here is no federal general common law." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

Two years ago, this Court declared that "[t]here is no federal general common law." *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2053 (1994).

Notwithstanding that, the Third Circuit below has directed the District Court "to permit the RTC[3] to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law." *Resolution Trust Corp. v. CityFed Financial Corp.*, 57 F.3d 1231, 1249 (3d Cir. 1995). It is a fool's errand on which the District Court has been sent in light of the clarity and consistency with which this Court has dealt with the matter of federal general common law.

This case arises under the provisions of Section 212(k) of the Financial Institutions Reform, Recovery & Enforcement Act of 1989 (Pub. L. No. 101-73, 103 Stat. 183, 243 (1989)). The statute provides, in relevant part, that

> [a] director or officer of an insured depository institution may be held personally liable for money damages in any civil action by, on behalf of, or at the request or direction of the [Federal Deposit Insurance] Corporation... acting as conservator or receiver of such institution...for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are

[3] The Resolution Trust Corporation ("RTC"), the party below and the original Respondent in this Court, ceased to exist on December 31, 1995, the Federal Deposit Insurance Corporation succeeding to its duties and responsibilities as of that date. *See* 12 U.S.C. § 1441a(m)(1).

> defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

12 U.S.C. § 1821(k).

In this case, the RTC, in its capacity as receiver for a failed federally-chartered and federally-insured institution, City Federal Savings Bank, sued certain former officers and directors of the institution (including the Petitioner) for both gross and simple negligence in the conduct of their duties. The officers and directors contended that the aforementioned statute had set a uniform national standard of "gross negligence," and that no cause of action would lie against them for conduct that did not rise to that level. The RTC contended--and the Third Circuit agreed--that the "savings clause" appearing as the last sentence of Section 212(k) trumped the earlier part of the Section, preserving some sort of unarticulated "federal common law" remedy for the RTC.

The difficulty with the Third Circuit's analysis is that it is inconsistent with the plain language of the statute, at odds with the historical context in which the statute was enacted, and it manifestly disregards this Court's recent holding in *O'Melveny & Myers v. FDIC*.

A. The Plain Language of the Statute

The statute unquestionably provides that officers and directors **may** be sued for gross negligence and anything else that exhibits a disregard of duty **greater** than gross

negligence. There is a necessary negative inference that must be drawn from that language, namely, that officers and directors may **not** be sued for any alleged disregard of duty that does **not** rise to the level of gross negligence. Without that negative inference, the statute is meaningless. As the Sixth Circuit has held, "[i]f the court reads the savings clause to preserve simple negligence claims, then the gross negligence standard explicitly articulated in the savings clause [sic] is redundant, meaningless surplusage." *FDIC v. Bates*, 42 F.3d 369, 372 (6th Cir. 1994). Fundamental rules of statutory construction prohibit such an interpretation. *See Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 112 (1991); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *United States v. Menasche*, 348 U.S. 528, 538 (1955).

Conversely, giving meaning and effect to the "gross negligence" standard set forth in the bulk of the statute does not have the effect of writing the "savings clause" out of the statute. There is a great deal of "other applicable law" that is "saved" by that clause. By granting the Corporation the right to bring a civil action for damages, for example, the law was not intended to deprive the Corporation of its rights under 12 U.S.C. Section 1818 to pursue such administrative remedies as cease and desist orders including affirmative action to correct conditions resulting from violations of law, rule or regulation or from unsafe or unsound practices, prohibition orders against institution-affiliated parties, or the pursuit of civil money penalties. But for the "savings clause" in Section 212(k) of FIRREA, it is possible that Section 212(k), concerning civil litigation for gross negligence, could have been construed as the exclusive

remedy for alleged misdeeds of officers and directors of failed insured institutions. (*See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979) ("[W]here a statute provides a particular remedy or remedies, a court must be chary of reading others into it.")) Consequently, it is not necessary, in order to find substance to the "savings clause" for that clause to be construed as "saving" some "federal common law" that would need to be created anew simply in order to be "saved."

B. Other Evidence of Congressional Intent

If the language of the statute itself is not plain enough on its face or by application of normal rules of statutory construction, the context in which the statute was enacted makes it clear that the legislature was attempting to draw a balance between two important objectives. On the one hand, Congress wished to preserve and protect the federal deposit insurance funds by enabling the cognizant federal regulatory agencies to pursue directors and officers of failed institutions for damages under some circumstances. Those deposit insurance funds were, at the time, endangered due to the remarkable number of financial institution failures in the decade preceding enactment of the statute.

Prior to 1989, at least some states had attempted to insulate directors and officers from personal liability for any of their actions short of actual willful misconduct, and that was an outcome unacceptable to Congress.[4] However,

[4] *See, e.g.*, 135 Cong. Rec. 7152-53 (Apr. 19, 1989) (Statement by Senator Riegle).

Congress did not wish to discourage a willingness on the part of highly qualified and experienced people to serve on the boards of directors of federally insured institutions.[5]

For that reason, Congress deliberately avoided the creation of a federal simple negligence standard because such a low threshold of culpability would dissuade qualified persons from serving as directors and officers.

Indeed, the original Senate bill provided for the exact standard of liability that the RTC has repeatedly asked courts to legislate judicially:

> any cause of action available at common law, including, but not limited to, negligence, gross negligence, willful misconduct, breach of fiduciary duty, breach of contract, conversion, fraud, waste of corporate assets, and violations of statutes.

S. 774, 101st Cong., 1st Sess. § 214(n) (1989). That is not, however, the statute passed by Congress.

In debating the proposed bill, several senators argued that it went overboard and would deter qualified individuals from serving as directors and officers. For example, in commenting on a related civil penalty provision of FIRREA, a number of senators wanted:

[5] *See* 135 Cong. Rec. 7137 (April 19, 1989)(Statement of Senator Heflin); *accord* 135 Cong. Rec. 7143 (April 19, 1989)(Statement of Senator Sanford).

> to ensure that financial institutions are able to attract strong and capable individuals as directors and officers.
>
> * * * *
>
> [W]ithout clarifying amendment, financial institutions may lose effective directors, maybe an entire board of directors.

135 Cong. Rec. at S4264 (daily ed. Apr. 19, 1989).

In response to these concerns, *see id.* at S4265, Senator Riegle, the floor manager for the bill, submitted an amendment which deleted the simple negligence cause of action and substituted language which, with only minor changes, became Section 212(k):

> (n) Liability -- A director or officer of an insured financial institution may be held personally liable...for gross negligence or intentional tortious conduct, as those terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right, if any, of the Corporation that may have existed immediately prior to the enactment of the FIRREA Act.

Id. at S4451-52. Speaking in favor of these modifications, Senator Sanford stated that:

> these changes are essential if we are to attract qualified officers and directors to serve in our financial institutions.... The amendment would permit the FDIC to bring an action or direct others to bring an action against the directors and officers of a financial institution if the director or officer acted with gross negligence or committed an intentional tort.

Id. at S4276-77. The Senator's comments reflect the deletion of simple negligence from Section 212(k).

The House made no substantive changes to Section 212(k), and the House-Senate Conference Report confirmed that the minimum standard of liability is gross negligence:

> Title II preempts State law with respect to claims brought by the FDIC in any cap[a]city against officers or directors of an insured depository institution. The preemption allows the FDIC to pursue claims for gross negligence or any conduct that demonstrates a greater disregard of a duty of care, including intentional tortious conduct.

H.R. Conf. Rep. No. 222, 101st Cong. 1st Sess. 393, 398 (1989), *reprinted in* 1989 U.S. Code Cong. & Admin. News 532, 437. As the "final statement of terms agreed upon by both houses of Congress, next to the statute itself, [the Conference Report] is the most persuasive evidence of

Congressional intent." *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), *cert. denied*, 479 U.S. 868 (1986).[6]

The post-enactment course of events relating to Section 212(k) is also relevant to an understanding of Congress' intent. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 687 n. 7 (1979). Indeed, the government's subsequent efforts to have Section 212(k) amended so as to codify a simple negligence standard undercuts contrary arguments that the statute, as enacted, preserved a floating federal common law cause of action.

First, in August 1991, the FDIC submitted to Congress a proposed amended savings clause which provided that:

> Nothing in the subsection shall impair or affect any right of the [FDIC] under other *applicable State or Federal law, including a right to hold such director or officer personally liable for negligence.*

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[6] *See also York v. Wichita Falls*, 944 F.2d 236, 240 (5th Cir. 1991) (court looked to conference report as "most significant legislative history"). The Third Circuit instead relied on the Senate Banking Committee's section-by-section analysis of S. 774. That analysis, however, was released two months *after* the Senate debated and passed S. 774 and thus was not part of the contemporaneous legislative consideration of S. 774.

Leibold, *Federal Common Law: What & Where?*, in CIVIL & CRIMINAL LIABILITY OF OFFICERS, DIRECTORS & PROFESSIONALS: BANK & THRIFT LITIGATION IN THE 1990'S 153, 161 (PLI 1991) (emphasis added). Then, after the FDIC withdrew this clear proposal, Congressman Baker, at the request of the FDIC, submitted a somewhat obscure amendment deleting Section 212(k)'s savings clause and providing that the statute retained:

> any right of the [FDIC] under any provision of *applicable State law or other Federal Law, including any provision of common law* or any law establishing the personal liability of any director or officer of any insured depository institution under any standard pursuant to such law.

H.R. 3435, 102nd Cong., 1st Sess. § 228 (Comm. Mark-up Oct. 18, 1991) (The "Baker Amendment") (emphasis added). After Congressman Schumer objected to the proposal and expressed the same concerns as in the original Senate debate on FIRREA--i.e., that the FDIC had gone "too far" and that no one would serve as a director of a financial institution if "liable for everything under the sun." House Banking Comm. Tr. at 283 (Nov. 19, 1991)--the Baker Amendment was withdrawn.

The only snippets of legislative history that purport to support the government's position thus are a version of the bill that was not enacted and a report which did not exist when senators voted on the version of the bill debated on the Senate floor. In contrast, the overwhelming weight of

FIRREA's legislative history confirms a gross negligence standard.

C. *O'Melveny & Myers v. FDIC*

As indicated above, this Court has recently -- in the context of FIRREA -- held that there is no federal general common law. That case involved, on its facts, a different section of FIRREA than is relevant in this case (12 U.S.C. Section 1821(d)(2)(A)(i), governing succession by the FDIC to all right, title, power and privilege of the institution for which it is appointed receiver). The FDIC argued there that the specific provision in issue was "nonexclusive" and could be supplemented or modified by federal common law. This Court concluded that such an argument was "demolished" by virtue of the fact that FIRREA, in its other provisions, including the provision directly applicable in this case, "specifically create[d] special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver." *O'Melveny & Myers*, 114 S. Ct. at 2054.

Thus the Third Circuit has misapprehended the breadth of the statutory occupation of the field that resulted from the enactment of FIRREA, as definitively construed by this Court.

CONCLUSION

For all of the reasons set forth herein and in the Brief of the Petitioner, your amici hereby respectfully urge that the decision of the Third Circuit be reversed.

Respectfully submitted,

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